

NO. 44,365-01-B

EX PARTE
ERNEST LOPEZ, II
IN THE 181ST DISTRICT COURT
OF POTTER COUNTY, TEXAS

Affidavit of Joni L. McClain, M.D.

I. GENERAL INTRODUCTION

My name is Joni L. McClain. I am a licensed medical doctor in Texas, Oklahoma, and Indiana. I graduated from the University of Oklahoma, School of Medicine in 1983 with a doctor of medicine degree. I then completed a four year residency program at the Oklahoma Teaching Hospitals (OUHSC) in Anatomic and Clinical Pathology. I was Chief Resident during my fourth year of residency. Subsequently, I did a one year fellowship in Forensic Pathology at Indiana University. After finishing my forensic pathology fellowship, I spent four years at the Office of the Armed Forces Medical Examiner in Washington, D.C. as a medical examiner fulfilling my Health Profession Scholarship commitment. I served during Operation Desert Storm. I was a Major in the United States Air Force. I received the Defense Meritorious Service Medal, Joint Service Commendation Medal and Joint Service Achievement Medal while on active duty. I was hired at the Southwestern Institute of Forensic Sciences as a medical examiner in June 1992. I was promoted to Deputy Chief Medical Examiner in 2004. I am board certified in Anatomic, Clinical, and Forensic pathology by the American Board of Pathology. I have been practicing forensic pathology continuously from 1987-present. I have testified as an expert witness in many court cases and have performed thousands of autopsies. I have testified in child death cases and have performed autopsies on numerous children. I currently lecture on child abuse around the country in connection with the Department of Justice's Office of Juvenile Justice and Delinquency Prevention and the National Center for Missing & Exploited Children which is coordinated through the Fox Valley Technical College, Criminal Justice Division and Child Protection Training Center. I am an Associate Professor of Pathology at the University of Texas Southwestern Medical Center. I was President of the National Association of Medical Examiners in 2002, Vice-President in 2001, and Chairman of the Board of Directors in 2003. I was a member of the Board of Directors from 1993-1999. I am currently a

member of the National Association of Medical Examiners and a Fellow in the Path/Bio section of the American Academy of Forensic Sciences. I was a member of the International Advisory Board on Shaken Baby Syndrome from 2002-2004.

II. RECORDS REVIEWED

For the purpose of this affidavit, I have reviewed the following:

Affidavit of Dr. Douglas Shelton

Affidavit of Elizabeth A. Johnson, PhD

Affidavit of Dr. Michael Sven Pollanen

Affidavit of Dr. Robert Sunderland

Affidavit of Dr. Lloyd White

Affidavit of Dr. Waney (Marian Valerie) Squier

Affidavit of Dr. Richard Soderstrom

Affidavit of Debbie Jenkins

The Southwestern Institute of Forensic Sciences Autopsy file on Isis Charm Vas

III. GENERAL STATEMENT & SUMMARY

I performed an autopsy on Isis Charm Vas on October 31, 2000. In my opinion and beyond a reasonable medical probability, the manner of Isis Charm Vas' death was a homicide. It is my opinion, beyond a reasonable medical probability, that the cause of death is due to blunt force injuries. These current opinions are identical to those reported in my autopsy report. It is my opinion that other alternative hypotheses were ruled out at autopsy to a reasonable medical probability. Eight medical examiners, who are board certified by the American Board of Pathology in forensic pathology, support the conclusions of the autopsy beyond a reasonable medical probability.

IV. CAUSE OF DEATH IS BLUNT FORCE TRAUMA

I used the term multiple blunt force injuries as the cause of death. The most significant finding is the blunt force trauma of the head which includes the trauma to the brain. This case is classic for the injuries seen in non-accidental head trauma cases. The child will develop symptoms very rapidly after these severe head injuries

are inflicted on the child. The history that the child was not acting normally as I describe herein before being left in the sole adult custody of Mr. Lopez is a key element to the investigation. The child was not normal as I define that term in this affidavit after being in the sole adult custody of Mr. Lopez. The findings at autopsy are consistent with the time frame in which Mr. Lopez was the sole adult custodian of the child. I gave a time range in my testimony that includes the time in which Mr. Lopez was the only adult alone with the child. To ignore the investigative history when correlating the findings seen at autopsy is not considered acceptable medical practice in the United States.

In response to Dr. White's comments on older bruises, he is missing the point if he is solely relying on old bruises to date the lethal injury/injuries. There are recent areas of hemorrhage found at autopsy. The significant issue is the severe trauma to the brain that is consistent with the time frame in which Mr. Lopez was the only adult custodian of the child.

Based upon my medical experience and training, I have reservations about the unequivocal dating of bruises by their color alone. I refer to one article in this regard. Schwartz AJ, Ricci LR. How Accurately Can Bruises Be Aged In Abused Children? Literature Review and Synthesis. Pediatrics 1996; 97: 254-257.

IV. THE HOSPITAL CAUSED THE LETHAL INJURY

Based upon my training and experience, the comment that the hospital caused the fatal injuries is totally missing the point. A healthy child would not be taken to a hospital. The child was clinically dead when she presented to the hospital. The hospital did not cause the lethal injuries to Isis Vas.

"Massive rehydration, blood transfusions, an extended sexual assault examination, and an organ harvest" have no bearing on the fact that this child died of blunt trauma.

V. TIMING OF INJURIES

In my opinion and to a reasonable medical probability, the timing of the injuries

based primarily on my examination of the histological slides would be consistent with the child being injured within a time frame of 24 hours prior to hospitalization or clinical death. This timing is clearly within the time frame in which Mr. Lopez became the only adult caretaker of this child, which was shortly before Isis stopped breathing and became unresponsive.

In response to some of the comments made by Drs. White and Pollanen, I would like to reiterate that based on my training and experience and to a medical probability, the histology is consistent with the time frame in which Mr. Lopez was the sole adult caretaker of Isis Vas. Based upon my training and experience and to a medical probability, the histology is consistent with the time frame given by Dr. Levy at trial. The bilateral retinal hemorrhages were observed and documented by Dr. Levy. So, in addition, Dr. Levy's findings are also consistent with autopsy findings on the timing of the injuries. In my opinion, Dr. Levy, a pediatric intensivist and clinician, is timing the lethal injury based upon his medical training, knowledge, and experience.

Moreover, based upon all of the autopsy evidence, based upon my training and experience, and to a reasonable medical probability, the lethal injury was within the time frame when Mr. Lopez was the exclusive adult caretaker of this child based upon the medical history and investigative facts provided to me. Based upon all of the facts known to me and to a reasonable medical probability, it is my opinion that Isis Vas received the fatal injuries within minutes or an hour or so of the time when the child was hospitalized on Saturday, October 28, 2000.

It is also my opinion that Isis Vas would not be acting normally within a "short period" of time after she sustained her severe head injuries. Examples of not acting normally may include unconsciousness, seizure activity, etc.

Iron stains were performed on tissue blocks that included the subscalpular hemorrhage, subdural hemorrhage and vaginal region. The findings do not change my conclusion as to the timing of these injuries.

VI. MEDICAL LITERATURE AND FACTS SUPPORTING THEORY THAT LOPEZ IS THE RESPONSIBLE PARTY

I want to make the following observations partially from Mr. Lopez' statement,

dated 28 October 2000, 1:21p.m. and reference some medical literature in this regard:

- a. Mr. Lopez was with Isis Vas while she was conscious and able to take fluids. He then describes "cleaning her up real well" and "I cleaned her creases and the private area real well." He was gone 10 minutes and then picked up Isis and she was limp.
- b. In my opinion and to a medical probability, the injuries to the perineal area are consistent with the time frame in which Mr. Lopez talks about "cleaning" Isis Vas.
- c. Mr. Lopez describes Isis as being "limp" after he returns from the kitchen. In my opinion and to a medical probability, Isis Vas sustained her fatal injuries while under the exclusive adult care of Mr. Lopez. She went from being able to drink fluids to becoming totally unresponsive. She never regained consciousness after being in the exclusive adult control of Mr. Lopez. In my opinion, it is logical to conclude that based upon these and other facts and opinions recited herein that Mr. Lopez was the perpetrator of the inflicted head trauma that killed Isis Vas."
- d. In the book, *Abusive Head Trauma in Infants and Children: A Medical, Legal, and Forensic Reference*, page 62 states that "the most important thing about confessions, complete or partial, is that they put single individuals with children when the symptoms begin."
- e. The most frequent evidence used to time traumatic events, and thereby identify abusers is the onset of symptoms. Multiple studies of abusive head trauma have suggested that the onset of symptoms begin immediately at the time of the trauma.
- f. Durham AC, Shristian CW, Rorke LB, Zimmerman RA. Nonaccidental Head Injury In Infants- The "Shaken-Baby Syndrome" N Engl J. Med 1998; 338: 1822-1829.

Starling SP, Patel S, Burke BL, Sirotinak AP, Stronks S, Rosquist P. Analysis Of Perpetrator Admissions To Inflicted Traumatic Brain Injury In Children. Arch Pediatr Adolesc Med. 2004; 158: 454-458.

Gilles EE, Nelson MD Jr. Cerebral Complications Of Nonaccidental Head Injury In Children Pediatr Neurol 1998; 19: 119-128.

Comments of Dr. Pollanen

Bruises are caused by blunt trauma. There is no evidence that this child was

bitten by a spider. It is my opinion that it is logical that Lopez is tacitly confessing to the fact that he sexually assaulted Isis Vas when he says he "cleaned her real well" or he is attempting to explain away in advance any findings of a sexual assault that might be discovered.

Children in Home

It is my opinion that a 3 year-old child could not inflict the injuries that resulted in the death of Isis Vas.

Timing of Fatal Injuries (Grandpa Vas)

In my opinion and to a medical probability, the lethal injuries are fresh and not consistent with the time frame in which Grandpa Vas was with the child. The child would not have been acting normally as I described herein after the fatal injuries were inflicted.

Timing of Fatal Injuries (Dr. Vas, Isis' mother)

I have been informed that Dr. Vas was not in Texas when Isis Vas developed her symptoms that directly lead to clinical death. In my opinion, this excludes Dr. Vas as the perpetrator.

VII. SEXUAL ASSAULT

Based upon my examination, the posterior fourchette was lacerated. In laymen's terms, that means it was torn. This means that there was blunt trauma of the genital region. I noted the laceration and extensive soft tissue hemorrhage in my autopsy report. There were contusions around the anus.

It is my opinion to a medical probability that the injuries to the genital and anal region are not due to diaper rash, contact dermatitis, a urinary tract infection, or bleeding disorder. In stark contrast, they are due to blunt force trauma.

Sperm does not need to be present in order to diagnose a sexual assault.

To a very high medical probability, medical personnel did not cause the injuries to Isis Vas' vagina and anus. The nurses who are trained in sexual assault examinations are highly trained. They do not cause sexual assaults. It is illogical to believe that a child would be examined for sexual assault unless there was a suspicion that a sexual assault had occurred. All children brought to the emergency room are not automatically given a sexual assault exam.

VIII. MEDICAL HYPOTHESES THAT DID NOT CAUSE ISIS VAS' DEATH

Bug Bites/Venom Poisoning

In my opinion and to the highest medical probability, the alleged "bug bites, old bruises, or "bumps" as I understand them to be described by various individuals were not the cause of any lethal injury and are unrelated to the lethal injury.

The child was able to function normally as I have described during the time period of these alleged bug bites and old bruises. A poisonous bite did not cause Isis Vas' death because blunt force trauma is not caused by poison by definition.

There was no evidence of an allergic reaction at autopsy.

In this case, it is clear that the serious and fatal injuries that I documented at autopsy caused the child's death as opposed to a minor older bruise(s) that was/were previously observed.

Blood Clotting Issues

In my opinion and to a medical probability, Isis Vas' abnormal bleeding times on October 28, 2006 are consistent with the findings of severe blunt force injuries of the head. In this regard, it is well known that bleeding and clotting studies in patients with head injuries may be abnormal. I reference one article at this time to support my position. Hymel KP, Abshire TC, Luckey DW, Et al. Coagulopathy In Pediatric Abusive Head Trauma. Pediatrics 1997; 99: 371-375.

I am unaware of this child ever having a diagnosis of coagulation problems prior to her lethal injury.

Blisters, Purpura, or Petechial Hemorrhages

Based upon my examination and to a medical certainty, Isis Vas did not have blood blisters, purpura, or petechial hemorrhages at the time of autopsy. Photographs taken at the time of autopsy confirm these findings

Serious Illness Prior to Hospitalization

Upon arrival to the hospital, the child's lungs were clear to auscultation. (PICU attending note 28 Oct 2000). This would be evidence that there was no pneumonia near the time of Isis' admission to the hospital. The pneumonia seen at autopsy is consistent with that seen when a child is left on a ventilator after being declared brain dead in order to procure organs. In this regard, it is noteworthy that an organ from Isis Vas was transplanted into another individual and the 47th District Attorney's Office has been informed that the transplant recipient was still living in October 2006.

Black Stool and Internal Bleeding Issues Raised by Others

Tylenol or acetaminophen was not detected in postmortem toxicology. The only hemorrhage described is associated with blunt trauma. I did not observe any melanotic stool at autopsy.

SDH, Blood Leak, & Hypoxia

I disagree with Dr. Squire at paragraph 32 because a traumatic lethal SDH in a child is not often a thick, space-occupying and unilateral or asymmetrical mass. A SDH in a child indicates trauma to the brain cells.

A traumatic SDH occurs by tearing of the bridging veins.

Injury to the brain parenchyma causes the brain to swell with resultant hypoxic injury as well as traumatic injury to the cells.

Venous Sinus Thrombosis

Venous sinus thrombosis was ruled out at autopsy.

Rebleed Issues

The SDH was fresh and rebleeding is not an issue.

Questions Raised about the Lifestyle & Mental Condition of the Mother of Isis Vas.

I have no opinion. I don't know Dr. Vas and I am not a psychiatrist.

Other Medications May Have Killed Isis Vas

SWIFS performs a thorough drug screen. Toxicology revealed no evidence that this child died of a drug overdose. The findings at autopsy are indicative of inflicted blunt trauma.

Transplanted Dangerously Infected Liver Hypothesis and Prior Infection

In my opinion, transplant surgeons would not transplant a liver that would not adequately function in another individual. The use of the liver indicates that it was viable. In this regard, I would further emphasize that the 47th District Attorney's Office has been informed that the transplant recipient was still living in October 2006. If this is true, this information supports my opinion and undermines Dr. Sunderland's opinion that a dangerously defective liver was transplanted.

Short Falls

In my opinion, the purported short fall off the couch on October 28, 2000 while under Mr. Lopez' control and only witnessed by him did not cause Isis Vas' death. In my opinion, the simple short fall theory is not valid.

Based upon my training and experience, children fall quite frequently and these falls are witnessed. If children were so delicate that a short fall would frequently cause death, there would be thousands of cases reported to medical examiners' offices on a

yearly basis. Based upon my training and experience, medical examiners do not see these types of death in which a simple short fall is witnessed by more than one person and the child is dead.

In my opinion, the use of Dr. Plunkett's short falls article is misleading. Dr. Plunkett did not perform the autopsies cited in this study. Many of the cases involve children who died in swings. This would be the same mechanism as if the perpetrator took the child and slammed his/her head into a wall. The mechanism is different from a simple fall. In this study, 18 children died out of thousands of cases. Again, the study has to be evaluated as to the truth of the alleged way that the child was injured. People do lie when a child is injured as a result of criminal behavior.

IX. OTHER ISSUES RAISED OR MENTIONED

Independence of Medical Examiner

Dr. White attacks the process because there was no independent medical review. In my opinion, a medical examiner is an independent source. A medical examiner uses his or her training and experiences to render an independent opinion. I did so in this case. Seven board certified forensic pathologists also came to the same conclusion that I did. All of us were trained in the United States and are board certified by the American Board of Pathology.

Accusation that SWIFS Explicitly Ignored Items

All available information given to me, including historical information, investigative information, medical records, and the statement of the defendant were reviewed by me. I did not ignore any evidence presented to me. Dr. White would have no way of knowing what I reviewed or didn't review. He never contacted me concerning this case.

I want to address Dr. White's comments at paragraphs 82-86 about my examination and investigation in several particulars. Based upon my training and experience, this autopsy was conducted in a thorough and open-minded way. If Isis was acting normally as I have previously described and had a bruise or several bruises noted by others several days before her hospitalization, this indicates that these bruises were not

a fatal injury or related to the fatal injury.

I thoroughly investigated and came to an independent conclusion as to the manner and cause of death. I did not merely accept hospital conclusions or Dr. Levy's diagnoses. A part of my duty is to render an independent determination. Further, in this case, a board certified (American Board of Pathology) neuropathologist assisted in the examination of the brain. He found no evidence of infection and concurred with the diagnosis of blunt trauma of the brain.

I will repeat that if Dr. White was so concerned with the autopsy and autopsy report, he could have contacted me prior to the filing of his affidavit. Dr. White needs to go through the legal system now. Dr. White's statement that "the hospital tests and the autopsy were seriously inadequate for a homicide investigation given the child's complicated medical and social history and multiple symptoms in the days prior to death" is ridiculous. A thorough autopsy and sufficient investigation was performed. Investigative reports are present in the SWIFS file. This case was photographed. The brain was examined by a board certified neuropathologist at the Department of Neuropathology at the University of Texas Southwestern Medical School. Special stains were obtained to look for the axonal injury, etc.

There is ample information for an outside consultant to review. The SWIFS files are defensible and the opinions of 8 board certified forensic pathologists at SWIFS are defensible.

Abrasion to Back of Head not Documented at Hospital

Based upon my years of experience in forensic pathology, (1) the presence of hair sometimes can make it difficult to see an abrasion, (2) it is not unusual for an autopsy to find additional injuries that were not initially noted on hospital admission, and (3) a bruise develops over time and can become more identifiable or pronounced over time.

Autopsy Findings Support Dr. Levy's Findings on Retinal Hemorrhages

The autopsy confirmed the findings of Dr. Levy of retinal hemorrhages. Retinal hemorrhages are a classic finding in Inflicted Head Trauma. It is my opinion that the retinal hemorrhages occurred as the result of blunt trauma.

Fractured Clavicle

The hospital radiological records and review of the x-rays taken at SWIFS confirm that the child had an old broken clavicle injury. This old fracture has nothing to do with the cause of death of Isis Vas.

The Parents' Medical History, Prenatal History and Heart Disease

The child died of blunt trauma. The prenatal history and family history as I understand it does not change the cause and manner of death in this case. Isis Vas' heart was normal. The mother's use of drugs during pregnancy does not account for the blunt force injuries seen on Isis. There is no evidence found at autopsy of a genetic abnormality.

Coumadin & Rat Poison

Blunt force injuries are not caused by coumadin or rat poison. In the textbook by Baselt entitled *Disposition of Toxic Drugs and Chemicals in Man*; 7th edition, page 1195, it states that poisoning with warfarin (coumadin) is an infrequent event, since a single dose is usually insufficient to cause significant depression of prothrombin time, and continuous intentional administration of the drug over a long period of time requires a great deal of perseverance. Further, I have no information that there was evidence of coumadin found during the investigation of the scene or otherwise in this case. In my opinion, Isis Vas' death was not the result of an overdose on one occasion or multiple occasions of a blood thinner.

Organ Procurement and Cause of Death

The organ procurement did not cause the death of Isis Vas. The child was clinically dead upon arrival at the hospital. The organ procurement did not affect the cause and manner of death in this case.

The Investigation

Responding to Dr. White's comments (paragraphs 94-100); I believe the

investigation was complete and sufficiently thorough in this case. Mr. Lopez was the sole adult caregiver at the time that Isis Vas sustained her fatal injuries.

Testimony Far Beyond Medical Research (Allegations by Dr. White)

Based upon my training and experience, as I have stated herein, the medical testimony is backed by the literature. Forensic pathologists must rely on the autopsy information and process as well as the investigation when coming to their expert opinions. Otherwise, the pathologist is working in a vacuum and missing key data. I do not understand how Dr. White can claim to know what medical literature others have read and considered without asking them.

Shaken Baby Syndrome

In my autopsy report, I never used the term Shaken Baby Syndrome. However, I will attempt to address the injuries in that context.

- a. In my opinion and beyond a reasonable medical probability, most of the time, blunt trauma will be seen in cases that are classified as "shaking baby syndrome" or shaking baby impact syndrome. This is the reason that the majority of forensic pathologists use the terms blunt trauma, blunt force injuries, or craniocerebral trauma in the cause of death ruling. This case has evidence of impact so the shaking alone concept is not relevant to this case.
- b. In my experience and beyond a reasonable probability, the severity of the injuries in this case is similar to injuries seen in motor vehicle accidents. My opinion and determination is also based upon autopsies of children who have been in motor vehicle accidents. I find no historical or physical evidence in this case that Isis Vas was involved in a motor vehicle accident.
- c. In my opinion and based upon reasonable medical probability, I will address some incorrect statements of Dr. White. In this regard, a subdural is caused by tearing of bridging veins. DAI is due to neurons shearing.
- d. Unquestionably a human baby is not the same as an animal or biomechanical model. Each human being is unique. It goes without saying that it is unethical and illegal to shake babies or throw babies into walls, mattresses, and other objects to see how much force is needed to kill a child. Therefore, the studies using animals, etc. must be evaluated for their limitations.

- e. DAI and anoxic changes can be seen in inflicted head trauma. The presence of SDH indicates brain cell damage.

Separate v. Global Issues & Dr. Squire

Dr. Squire seems to want to isolate each issue and discuss medical issues separately rather than viewing all the factors and how they relate to the whole picture. No natural disease process caused the blunt trauma. Hypoxia of the brain is not unusual in blunt force trauma cases of the head.

Psychological Reports on Guilt

Medical examiners do not consult psychological tests or reports to determine if someone has committed a crime. Medical examiners are independent. We are not like the ME's on CSI, etc. Our job is to determine the cause and manner of death. It is up to the legal system to choose to indict someone for a crime.

X. SOME OTHER MATTERS

Diaper Rash

There was no diaper rash at autopsy. This is documented by the autopsy photos.

Issues on Timing and Dr. Levy

Dr. Levy and I are in agreement that the injuries sustained by Isis Vas are consistent with the time frame in which Mr. Lopez was the sole adult custodian of Isis Vas.

CMV

CMV was not found at autopsy. CMV does not cause blunt trauma.

Dr. McClain Already Made her Diagnosis Without Having the Neuropathology Report

This case was so clear cut and classic that I did not need to have the completed

neuropathology report in order to rule this case a homicide due to blunt force injuries. However, as I have reported in this affidavit and was listed in the autopsy report, the other medical procedures confirmed my opinion.

Joni L. McClain MD
Signature of Joni L. McClain, M.D.


Subscribed and sworn to before me this 09 day of April, 2007.

My commission expires:

09/14/2010

RUNETTE J. ELLIS

Notary's Printed Name

 **RUNETTE J. ELLIS**
Notary Public, State of Texas
My Commission Expires
SEPTEMBER 14, 2010
Ruette J. Ellis
Notary Public, State of Texas